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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE:** B-202112

**DATE:** November 16, 1981

**MATTER OF:** Michael J. Hanley - Retroactive  
Discontinued Service Retirement

**DIGEST:** Agency did not properly advise employee of his right to elect discontinued service retirement either at time he was notified of impending change in location of official duty station to outside the commuting area of his current worksite or at any time prior to relocation of it on December 1, 1980. Agency may retroactively change effective date of separation since agency did not provide employee with specific written notice of option to elect discontinued service retirement as required by regulation. This failure constitutes administrative error which justifies retroactive relief.

The Agricultural Stabilization and Conservation Service (ASCS), United States Department of Agriculture (DOA), Management Field Office, Kansas City, Missouri, requests our decision on whether one of its employees may be retroactively granted a discontinued service retirement. We hold that the employee is entitled to be separated effective November 30, 1980, because of the agency's failure to properly notify the employee of his right to elect discontinued service retirement.

The record in this case demonstrates that the employee, Mr. Michael J. Hanley, of the Washington State ASCS office, was notified that due to a change in the location of ASCS headquarters, effective December 1, 1980, he would be reassigned to the new headquarters, which was outside the commuting area of his current worksite. Mr. Hanley states that procedure requires that he reside within the new area that he was to serve. However, Mr. F. Wayne Bourn, Chief, ASCS Personnel Division, states that there is no record of Mr. Hanley signing a "mobility agreement" which would have permitted reassignment outside the commuting area of his current worksite. Additionally, Mr. Hanley's position description did not provide for such a geographic reassignment, and it is

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undisputed that Mr. Hanley was not advised of his right to apply for discontinued service retirement either at the time he was notified of the change in his official duty station or at any time prior to the relocation of it.

In a letter to the Chief, ASCS Personnel Division, the Office of Personnel Management (OPM) stated that Mr. Hanley appears to have met all the requirements for discontinued service retirement. Thus, OPM is willing to approve his application to take effect as of December 1, 1980, the date of the transfer of headquarters outside Mr. Hanley's commuting area, provided our Office will approve a retroactive change in records to show that he was separated on that date. For the purpose of this decision we assume that Mr. Hanley meets all the statutory and regulatory conditions to be eligible for discontinued service retirement. Thus, the only issue we will address is whether ASCS may retroactively amend their records to show that Mr. Hanley was separated effective November 30, 1980.

As a general rule a personnel action may not be made retroactive so as to increase the right of an employee to compensation. We have recognized exceptions to this rule where a clerical or administrative error occurred that (1) prevented a personnel action from taking effect as originally intended, (2) deprived an employee of a right granted by statute or regulation or (3) would result in failure to carry out a nondiscretionary administrative regulation or policy. Douglas C. Butler, 58 Comp. Gen. 51 (1978); Internal Revenue Service Employees, 55 *id.* 42 (1975); Panama Canal Commission Pilots, B-198983.2, November 19, 1980. Thus, the initial question is whether an administrative error occurred that would permit a retroactive change in records.

Discontinued service retirement is authorized by 5 U.S.C. § 8836(d), which provides in pertinent part:

"An employee who is separated from the service--

"(1) involuntarily, except by removal for cause on charges of misconduct or delinquency

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after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity."

The regulations implementing this statute are contained in Federal Personnel Manual Supplement (FPM Supp.) 831-1. Paragraph S11-2b provides in pertinent part:

"b. Requirement of specific written notice. It is not always necessary that an actual separation from Government employment be directed. However, an employee must have definite knowledge from a specific written notice that he or she faces involuntary separation from his or her position or from Federal service as of some specific date because of coming organizational changes before his or her resignation may be accepted as involuntary and qualifying for discontinued service retirement."

We have held under this paragraph that an agency's failure to advise an employee of his right to elect a discontinued service retirement under 5 U.S.C. 8336(d) (Supp. III 1979) was an administrative error which could be corrected by retroactively changing the records to show that the employee was separated prior to the effective date of the proposed personnel action. James J. Burns, B-202274, July 15, 1981.

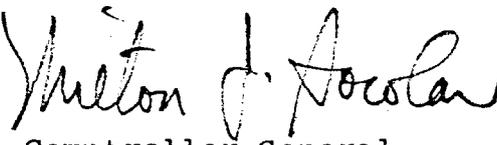
Mr. Hanley's entitlement to a discontinued service retirement is covered by Federal Personnel Manual Supplement (FPM Supp.) 831-1, paragraph S11-2e, which states:

"e. Reassignment directed out of commuting area. The separation of an employee who receives a notice that his or her reassignment is being directed outside the commuting area of his or her current worksite (or which newly requires a tour or tours of duty outside the commuting area of his or her current worksite) is considered involuntary, not for cause, for retirement purposes provided the position description or other written agreement or understanding does not provide for such reassignment." (Emphasis added.)

Thus, the agency was clearly required to notify Mr. Hanley, in a specific manner, of his right to elect a discontinued service retirement, especially in light of the fact that his position description did not provide for geographic reassignment outside the commuting area of his current worksite.

The agency's failure to give Mr. Hanley notice had the effect of depriving him of his right to elect a discontinued service retirement. The intent of the above-quoted regulations is to preserve the employee's option to elect a discontinued service retirement prior to the effective date of the proposed transfer. James J. Burns, supra. But for the administrative error of ASCS in not notifying Mr. Hanley, his right to elect discontinued service retirement would have been preserved. See James J. Burns, supra; Dale Ziegler and Joseph Rebo, B-199774, November 12, 1980. Furthermore, on the basis of the record before us, it is clear that Mr. Hanley would have elected discontinued service retirement and would have been separated on November 30, 1980, had he been given the proper notice.

Accordingly, Mr. Hanley's records may be retroactively changed to show that he was separated effective November 30, 1980.

*for*   
Comptroller General  
of the United States